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In the

SUPREME COURT OF THE UNITED STATES

October Term 1930

No.

Winifred M. Goudie, Appellant

vs.

Mary Hackman and Amanda Ellis, Appellees

ON APPEAL FROM THE VIRGINIA SUPREME COURT

JURISDICTIONAL STATEMENT

Winifred M. Goudie
Appellant, pro se
3114 North 9th Road
Arlington, Virginia 22201

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No.

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vs.

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ON APPEAL FROM THE VIRGINIA SUPREME COURT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Virginia, entered on June 6, 1980, sustaining an order of the Arlington County Circuit Court; and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The order of the Supreme Court of Virginia is not reported. The opinion and order of the Arlington County Circuit Court are not reported. Copies are attached hereto at Appendix A.

JURISDICTION

The order of the Supreme Court of Virginia denying a Petition for Declaratory and Injunctive relief was issued on March 20, 1980. A timely petition for rehearing en banc was denied on June 6, 1980 and this jurisdictional statement was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (2). The following decisions sustain the jurisdiction of this Court to review the orders herein: Lawrance v. State Tax Commission, 286 U.S. 276, 282-3; Largent v. Texas, 318 U.S. 418 and North Carolina R. Co. v. Story, 268 U.S. 288, 290-2.

QUESTIONS PRESENTED

1. Does the Code of Virginia violate the prohibition contained in the 4th Amendment to the U.S. Constitution against unreasonable seizure by the State, where its laws compel eviction under a deed of trust before a foreclosure sale and before payment of the proceeds of such sale to the defaulting debtor, or is any other Constitutional prohibition thus violated?

2. Does the Code of Virginia deny the right, under the 14th Amendment to the U.S. Constitution, to have adequate notice and an opportunity to be heard before eviction and foreclosure sale of a defaulter's property under a deed of trust?

3. Do the Virginia courts deny to pro se litigants the equal protection and due process guaranteed by the 14th Amendment to the U.S. Constitution?

STATUTES INVOLVED

Code of Virginia: Title 55, §§ 55-59 and 60; Title 26, § 26-15; and Title 17, §§17-83.2-3 and 4. (See Appendix A.)

STATEMENT

The questions presented arise out of a foreclosure sale of the appellant's home under a deed of trust which adopted by reference the Code of Virginia, Title 55, §§ 55-59 and 60. (Appendix B) Appellant (hereinafter, "Goudie") conveyed title under the deed of trust to Appellees (hereinafter, "Hackman and Ellis," trustees) to secure a $25,000.00 debt. Eviction was commenced by Hackman and Ellis under the said statutes before they conveyed title to the new buyer, and eviction proceedings continued after the title was conveyed at a time when the trustees refused to pay Goudie $27,000.00 due her from the proceeds of the foreclosure sale.

For reasons beyond her control, Goudie had defaulted on interest payments under the terms of the deed in the amount of $500.00. On January 14, 1980, while recovering from severe heart damage in California, Goudie received written notice of foreclosure and sale to be held on February 4, 1980 in Arlington, Virginia. She had previously received assurances by phone from Hackman that the note holders (on whose behalf Hackman also acted) would not object to an extension of time with the hope of selling the property to better advantage in the spring when the money market might also improve.

Immediately after the notice of foreclosure, Hackman phoned to convey an offer of $70,000.00 from one of her clients. Goudie refused the offer as the property was listed by realtors at $165,000.00 and she had recently refused a bona fide offer of $120,000.00.

Goudie was without funds to return to Virginia until January 27, 1980, when her disability check of $300.00 arrived. She was unable to obtain counsel upon her arrival in Arlington without a payment of " $1000.00 cash up front", demanded by 3 different attorneys.

On February 1, 1980, acting pro se, Goudie sought a Temporary Injunction to delay the sale for 30 days on the ground that

there had been no notice of amounts due; that the advertising and terms of sale (all cash) were such as to deprive her of a fair market price. She was eager to take back a 10% second trust as an inducement to buyers, and feared she would lose the opportunity to earn that interest at a time when she was totally and permanently disabled.

The Complaint for Temporary Injuction was heard and denied by Judge Paul Brown of the Arlington County Circuit Court on February 4, 1980. A motion for 24 hour stay to permit appeal was also denied. (Findings of Fact and Conclusions of Law; February 6, 1980, Appendix A)

(Subsequently, the order of denial, necessary to an appeal, was "lost" and a copy, entered nunc pro tunc, was not received until the time for appeal had run. Correspondence relating to lthis questionable incident was removed from the record which was later certified to the Supreme Court of Virginia.)

The house, located on Arlington Ridge Road in Arlington, Virginia, was sold that afternoon at auction for $78,000.00 subject to a 1st trust of $30,000.00. Comparable sales in the immediate neighborhood were shown to have brought between $135,000.00 and $297,000.00.

On February 6, 1980, a month before the settlement was to take place, Ellis arrived, unnannounced, and demanded entry and possession of the appellant's home. She threatened eviction and proffered a written notice of trespass which also stated the following:

> "The balance of the proceeds from the sale of the property on Monday will be payable to you after settlement and approval of the accounting of the sale by the Commissioner of Accounts. Kindly keep us informed of your address so that we may make these proceeds available to you as soon as possible."

When Goudie protested that she was very ill and had no money to pay for moving, and no place to go, and that she could not vacate until she received payment for the house, Ellis stated that the Virginia Code legalized her eviction proceedings at that time.

She then demanded "immediate" possession, instead of on the date 2 weeks hence specified in the letter, because Goudie was not "cooperating".

Goudie subsequently obtained the advice of Bernard DiMuro in the law offices of Hirshkop and Grad, P.C., in Alexandria, Virginia, because Judge Brown had been extremely sarcastic and abusive about her pro se status. After examining the relevant sections of the Code of Virginia which were only adopted by reference in the trust instrument, DiMuro and Goudie argeed on a Complaint for Temporary Restraining Order which was filed on March 3, 1980. The Complaint was primarily concerned with allegations of fraud by which the trustees were withholding Goudie's funds, and sought to have them removed on the ground that they had refused to submit a copy of the contract of sale or to designate the time and place of settlement. They also refused to submit a copy of the settlement sheet in advance as required by the Federal Real Estate Settlement Procedures Act no less than 12 days before settlement. They would not permit either Goudie or DiMuro to attend settlement or say when they might disburse Goudie's $27,000.00; at the same time that their formal action for unlawful detainer went forward in the courts.

They finally agreed to allow DiMuro to attend the settlement on the following conditions:

a. That Hackman's claim for fees of $824.00 (in another action) be paid without trial.

b. That Goudie agree not to take action for malpractice.

c. That Goudie vacate her home on the date of settlement, but before she had been paid, "so as to have the approval of the Commissioner of Accounts." (See Code of Virginia, Title 26, §26-15; Appendix B.)

All these matters were set forth in the Complaint which sought to enjoin settlement, and DiMuro agreed to appear for Goudie at the hearing thereupon set for March 5, 1980, in light of Judge Brown's

derisive comments about pro se litigants. On the morning of the hearing, DiMuro appeared with his counsel and stated to the court (Judge Brown) that he did not represent Goudie.

Goudie was thus forced to proceed with oral argument and to suffer further humiliation for not having an attorney.

The temporary restraint was denied. Judge Brown ordered that Goudie submit objections to the proposed settlement sheet (which he then handed her) in writing; and that she attend the settlement later that day and listen, but not speak or otherwise participate. This got a big laugh in the courtroom, but it is not due process prior to the loss of one's home.

It was at this hearing that Goudie first raised the question of Constitutional due process in the taking of property without compensation, notice or the right to be heard. Judge Brown did not address or rule upon the Constitutional question. (See order of March 5, 1980 at Appendix A.)

Goudie then appealed Judge Brown's order to the Virginia Supreme Court and again raised the Constitutional questions presented above. (Petition for Declaratory and Injunctive Relief, pp. 1, 2, 4, 6, and 7.) In part, as follows:

". . .petitioner also seeks a declaratory judgment by this Honorable Court that the aforementioned foreclosure sale and subsequent conveyance of title at settlement, from which Goudie was excluded for all practical purposes, without payment to Goudie of her share of the proceeds, while eviction proceedings go forward, is repugnant to the Constitution of the United States under the 4th Amendment which prohibits unreasonable seizure of property; and under the 5th Amendment which prohibits the taking of property without just compensation; and under the due process provisions of the 14th Amendment."

She further discussed "informed consent" and " 7 full pages of the Code of Virginia which the trust instrument adopts by reference, inserted by the trustees, to 'provisions of Title 55, Sections 59 and 60, of the Code of Virginia'. She then made a "formal request for

declaratory judgment that the laws of Virginia . . .are an offense to the Constitution of the United States."

This petition was denied without findings. (Appendix B)

A Petition for Rehearing en Banc , which discussed the Constitutional questions at pages 1 and 3 was also denied.

REASONS FOR REVIEW

1. The offending section of the Virginia Code (supra) sets forth the trustees' obligations as follows (in relevant part) :

> "55-59 (6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary, the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and shall take possession of the property and proceed to sell the same at auction . . ."

It is clear that the legislative intent is to proceed from "possession" to sale - in that order; and that payment cannot precede possession. Thus the owner is displaced or evicted without payment for his property.

A three-judge District Court expressed the result precisely:

> ". . .Then the ball game is over. The mortgagor has become at best, a squatter, at worst, a trespasser."
>
> Turner v. Blackburn, 389 F. Supp. 1250 at 1257 (1975)

Thus, in violation of the 14th Amendment, the State of Virginia has "made a law" which abridges "the privileges and immunities of the citizens of the United States -- the privelege of being secure in our houses from "unreasonable seizure." What is "unreasonable" about this seizure is that if the defaulter had enough money to move his belongings and himself out of the house being sold, he would probably not be in default. Even more unreasonable is that in most jurisdictions, his belongings would be put out in the street by the sheriff within 5 days. In Arlington, they would then be removed to the city dump after 24 hours.

2. By way of satisfying the due process requirement of adequate notice, the usual archaic language of foreclosure prevails in the Virginia Code; ie., posting at the county courthouse and advertising in a publication of minimum circulation on the back pages which no one but lawyers ever reads because the print is too small. The fallacy in this procedure is better stated in Turner (supra) :

> "To propose to a homeowner that he trek to the courthouse or spend 20 cents to examine the fine-print legal notices, daily for the duration of a 20-year mortgage, as his sole protection against summary eviction, seems to us to offer him nothing of value."

The Virginia Legislature recently added a more practical provision for personal notice: (§ 55-59 (6) in relevant part)

> "The trustee or party secured shall give written notice of such proposed sale by personal delivery, or by certified or registered mail to lthe present owner of the property . . . Mailing of a copy of the . . . notice fourteen (14) days prior to such sale shall be sufficient compliance with the requirement of notice."

But in the next sentence, the legislature disclaims even this meager guarantee:

> "Failure to comply with the requirements of notice shall not affect the validity of the sale under the deed of trust . . ."

Why else would the notice be required, if not to "affect the valididy of the sale?

In the instant case, 14 days notice was not adequate to travel to the place of sale; to obtain legal aid or reasearch the law; to advertise the sale with a simple sign on the house (which the trustees hadn't bothered to arrange). Much less was there time to borrow money. Indeed, any good credit risk would be hard put to find several thousand dollars within the time that was left. Given the uncertainties of the U.S. Postal Service, the chances of "adequate" notice become even more remote.

And what of an elderly or hospitalized owner -or absent heir?

The essence of effective notice is clarified in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950) :

> ". . .an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

and in Lambert v. California, 355 U.S. 225, 228 (1957):

> "To satisfy the notice . . .required before property interests are disturbed, before assessments are made, before penalties are assessed. . ."

and, again, to cite Turner, (supra) at 1259:

> ". . .Injunctive relief . . . does not suffice because (1) the burden of proof is clearly on the mortgagor; (2) he most likely must show irreparable damage as by inadequacy of the bid; and (3) a condition precedent to releif is a bond providing full indemnification."

Turner v. Blackburn is a case in which no notice was given the defaulting owner, as distinguished from the instant case, in which notice was merely inadequate. But Turner is a thoughtful and through examination of the power of sale without opportunity for redemption -- the harsh distinction between a mortgage and a deed of trust, usually -- a cruel legislative device as much in North Carolina as in Virginia or any other State. Such a sale is in general use only in 18 jurisdictions in this country. They are considered valid i the other states, but are rarely used.

Osborn, Handbook on the Law of Mortgages, 726 (2d ed. 1970)

In Turner, the three-judge District Court examins the full spectrum of abuse of Constitutional rights which is imposed upon a deed of trust debtor under these lopsided statutes; adequate and timely notice, waiver of rights, informed consent, hearing before sale and/or eviction, opportunity for redemption, possessory rights to real property, ownership, State involvement, sanctions and verifications of the actions and powers of the trustee, etc. Almost the same terms and concepts as the "Fuentes, Snaidach, Mitchell trilogy" -- except

that there is a great deal more at stake here than television sets.

By contrast, a Virginia case, Levine v. Stein, 560 F.2d 1175 (1977), decided by the Fourth Circuit Court of Appeals, and cited throughout the Virginia Code to validate its abuses, skips over all those rights with a bare minimum of findings and citations copied from the lower court opinion. It dismisses Turner because of the "differences" between the North Carolina and Virginia statutes, and finds no "State action" in the latter. In fact, where the two are different, the Virginia statutes are the more abusive of Constitutional guarantees.

Levine (supra) deals entirely with cases in which the trust instrument contains specific default clauses -- not the statute -- and thus did not even approach the statute complained of in the instant case. The opinion also ignores the "State action" taken by the "State legislature" which is forbidden by the 14th Amendment to "make or enforce any law" which shall abridge out rights.

If the State of Virginia choses to enter the contractual arena with lenders and borrowers and purchasers and trustees, so as to sanction the deed of trust sale by legislation, then it has an obligation to give "equal protection" to all four parties to the contract. The forgotten purchaser here is no better off than the borrower; he has paid cash for a faulty title so long as the trustees do not disburse the owner's money. As the matter now stands, most States protect only the trustee and his fees and his absolute power over the property of others.

The legislative purpose, as seen by the North Carolina Court is:

> ". . .a scheme designed at least in part to lower the cost and increase the efficiency of real estate foreclosures. It is in effect, a streamlined version of the judicial sale."

"Lower the cost" to whom? Surely not the cost to the unfortunate borrower?

The "streamlined" judicial sale appears to have cut some Constitutional corners, and we respectfully submit that this Court is empowered, and has an obligation to examine the legislative purpose of these statutes and determine if the Constitutional corners ought not be restored.

The victims are never wealthy developers or the banks who lend under these laws; but ordinary, hard-working citizens, unschooled in the law and dependant upon trustees to whom they pay large fees in addition to 3% of the sale price of a hasty foreclosure (also not mentioned in the deed of trust). What they get for their money are vague reverences to "Code of Virginia", and "catch phrases; incomprehensible to the layman, and indeed, to may lawyers, such as we find at §55-60 (1) through (10). These are permitted to be substituted in the deed of trust for a full page and a half of highly relevant conditions which the borrower will never see because they may be used "as if" the deed set forth these conditions. (See Code of Virginia, Title 17, §17-831, Appendix B)

There can be no informed consent to these camouflaged conditions for borrowing, and they are, without exception, disadvantageous to the borrower who has paid, and will pay even more upon foreclosure, for their inclusion in his deed of "trust".

3. Question 3. is not unique to Virginia courts, but the abuse there is more determined. The Code of Virginia pays lip service to the right of pro se litigants but the reality is that the right to be heard is so sodden with unreasonable judicial bias that that right is reserved for lawyers. As this case so clearly shows, pro se litigants are purposefully and systematically denied any semblance of equal protection in the Virginia courts. The order by Judge Brown on March 5, 1980, is a classic example of the vindictive treatment of

litigants who do not have "$1000.00 cash up front". (Appendix A)

Here, Judge Brown "ADJEDGED, ORDERED AND DECREED that whereas the Complainant is not an attorney, her signature to this order be,and it hereby is, waived."

The Supreme Court of Virginia Rules of Procedure, Rule 1:13, do indeed so provide. But on the previous page, Rule 1:5 provides a definition of "counsel of record", which includes a "counsel or party". Common courtesy, however, would dictate what the rules omit.

This discriminatory action by the lower court is "State action", as is the previous concealment of another order and the removal of correspondence from the certified record until the time for appeal had run. At best, this "State action" is a denial of equal protection. At worst, it is record tampering and obstruction of justice.

These matters were raised on appeal to the Virginia Supreme Court in the Petition for Declaratory and Injunctive Relief at page 1, para. 3.

The Clerk of the Virginia Supreme Court was later quoted in the Washington Post as follows:

> "The majority of them are not versed in court procedure, and they create more problems than anything else" said Allen Lucy, clerk of the Virginia Supreme Court, who estimates that court hears between 18 and 25 such cases a year. "We just about have to take them by the hand and lead them through it. When one of them comes in, the first thing you do is cringe and say something under your breath. And then you go ahead and help them." he said. Lucy said many of the people acting as their own lawyers tend to be people who might be better off seeking psychological help rather then legal redress. "They all think there's a conspiracy against them." he said, " but when you get into the case, you find they really don't have a leg to stand on."

He speaks for the bar and bench alike, but lawyers, too, sometimes need to be led by the hand.

CONCLUSION

We respectfully submit that the conflicting decisions between the circuits, where identical Constitutional questions are applied to identical statutes but result in different conclusions by the courts, should be resolved by this Court in a definitive way; so as to bring a measure of stability to the property rights enumerated in questions 1. and 2. above.

The status of pro se litigants should be raised out of the presumption of stupidity and lack of integrity it now suffers, and, as in question 3., into a modicum of equal protection.

Respectfully submitted,

Winifred M. Goudie

Winifred M. Goudie
Appellant, pro se
3112 North 9th Road
Arlington, Virginia 22201

In the

SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

Winifred M. Goudie, Appellant

vs.

Mary Hackman and Amanda Ellis, Appellees

ON APPEAL FROM THE VIRGINIA SUPREME COURT

APPENDIX A

THIS DEED OF TRUST made this 22nd day of February, 1979 by and between WINIFRED M. GOUDIE, party of the first part, and MARY COOK HACKMAN and AMANDA R. ELLIS, both residents of Arlington County, Virginia, Trustees, either of whom may act, parties of the second part;

WITNESSETH, that for and in consideration of the sum of Ten Dollars ($10.00), cash in hand paid, the receipt of which is hereby acknowledged, the party of the first part does hereby grant and convey with General Warranty of Title unto MARY COOK HACKMAN and AMANDA R. ELLIS, Trustees, all of that certain lot or parcel of land lying and being in Arlington County, Virginia, more particularly described as follows:

> All of the Westerly portion of Lot FOUR (4), Block FORTY-THREE (43), of the subdivision of ADDISON HEIGHTS, as the same appears duly dedicated, platted and recorded in Deed Book U-4 at page 56 among the Arlington County, Virginia, land records, lying West of a line drawn parallel with and 200 feet distant from the Easterly line of said Lot 4;
>
> LESS AND EXCEPT a small portion of said lot conveyed to the County of Alexandria, recorded in Deed Book 148 at page 40 for widening of Mt. Vernon Avenue (now South Arlington Ridge Road). (Map No. 37-001-007)

IN TRUST, HOWEVER, to secure to the holders thereof the payment of four (4) certain negotiable promissory notes of even date herewith, each bearing interest at the rate of twelve per cent (12%) per annum, interest only payable monthly beginning March 22, 1979, with the principal and any unpaid interest becoming due and payable in full on February 22, 1980, as follows:

(1)	Estate of Barbara B. Aller	$15,000.00
(2)	Ruth W. Nagel	$ 3,000.00
(3)	Richard M. Thacher	$ 1,500.00
(4)	Estate of Edwin P. Voss	$ 5,500.00

ELLIS & HACKMAN, LTD.
P. O. Box 1647
GTON, VIRGINIA 22210
243-5500

The said notes are payable at #501, 2009 North 14th Street, P.O. Box 1647, Arlington, Virginia 22210, or at such place or bank as shall be designated in writing by the payees. The right of pre-payment at any time is expressly reserved.

IT IS AGREED THAT IN THE EVENT OF A CONVEYANCE OF THE PROPERTY SECURING THE PAYMENT OF THIS NOTE, THE ENTIRE UNPAID BALANCE OF THE DEBT EVIDENCED BY THE SAID NOTE SHALL IMMEDIATELY BECOME DUE AND PAYABLE AT THE OPTION OF THE HOLDERS HEREOF.

THIS DEED OF TRUST is made under and pursuant to the provisions of Title 55, Sections 59 and 60, of the Code of Virgin 1950 and acts amendatory thereof, and shall be construed to impos and confer upon the parties hereto and the beneficiaries hereunde all the duties, obligations and rights prescribed therein except a the same may be modified herein.

In the event that foreclosure proceedings are begun, but terminated without sale hereunder, then the Trustees shall be entitled to a fee of two and one-half per cent (2-1/2%).

The party of the first part covenants to pay the debt hereby secured, all taxes, levies and assessments on said premises when same may first come due.

Should the indebtedness be fully paid without sale hereunder, then upon request of the party of the first part, this Trust shall be released to the party of the first part at her proper cost and expense.

The note hereby secured is subject to call upon default.

Exemptions waived.

WITNESS the following signature and seal:

Winifred M. Goudie (SEAL)
Winifred M. Goudie

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* June, 1980.

Winifred M. Goudie, Petitioner,

against

Mary Hackman, et al., Respondents.

Upon a Petition for Rehearing

On consideration of the petition of the petitioner to set aside the order entered herein on the 20th day of March, 1980, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

Before Justices Carrico, Poff and Compton of the
~~In the~~ Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 20th day of March, 1980.

Winifred M. Goudie, Petitioner,

against

Mary Hackman and Amanda Ellis, Respondents.

Upon a Petition for Declaratory and Injunctive Relief

On March 19, 1980, came the parties, upon the petition pursuant to Code § 8.01-626 and the matter was argued.

Upon consideration whereof, the said petition is denied.

A Copy,

Teste:

Clerk

...IA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

...ED M. GOUDIE,)

Complainant)

...) IN CHANCERY NO. 30475

...COOK HACKMAN)

...nd)

...A R. ELLIS)

Defendants)

ORDER

THIS CAUSE, came on to be heard on Monday, February 4, ..., upon the Complainant's Complaint for Temporary Injunction, ...imony of the parties, and witnesses, the exhibits introduced ...he hearing and upon argument by the parties.

38B

IT APPEARING TO THE COURT as stated in the opinion of ... Honorable Paul D. Brown, Judge, proper to do so, it is there- ...

ADJUDGED, ORDERED and DECREED that the Complainant's ...plaint for Temporary Injunction be and it hereby is denied.

Entered 2/8/80.

Paul D. Brown, Judge

...SK FOR THIS:

...KMAN, ELLIS & HACKMAN, LTD.

...nda R. Ellis

...y Cook Hackman

...N & OBJECTED TO:

...ilfred M. Goudie

...S & HACKMAN, LTD.
...Box 1647
...VIRGINIA 22210
...3-5500

RECORDED ... BOOK NO. 217 PAGE 138A ... February 8 ... 1980

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

WINIFRED M. GOUDIE	)	
	)	
Complainant	)	
	)	
v	)	In Chancery No. 30475
	)	
MARY COOK HACKMAN	)	
et al	)	
AMANDA R. ELLIS	)	
	)	
Respondents	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW

FROM: HONORABLE PAUL D. BROWN, Judge

WINIFRED M. GOUDIE, Complainant, pro se
MARY COOK HACKMAN, Respondent, pro se
AMANDA R. ELLIS, Respondent, pro se

2/6/80

This cause has a prayer for an injunction against the sale on date, February 4, 1980, of certain improved land in this county owned by the Complainant and advertised for sale by the defendant Trustees. The grounds of complaint presented are (1) that the Trustees' designation of terms of sale for cash with settlement in thirty days will bring too low a price; (2) the Complainant had not been notified and did not know of the amount due on the subject trust; and (3) that the Complainant had not been given evidence the beneficiaries had asked for a sale.

Passing reference was made to a conflict of interest on the part of the Trustee Hackman, who had previously represented the Complainant in Law No. 21112 of this court. It appears that representation has ended, and that any conflict, if it existed, is over.

A fourth basis for relief was orally presented in trial in appeal to delay the sale on general equitable principles. is to be denied for reasons hereinafter expressed.

This trust was given early in 1979 before Amendments to Sec. 55-59 and 55-60 became effective. The sale appears to been properly advertised under those sections, with the sale set no sooner than 22 days after the first ad of January 14, . Publication was in a local paper of general circulation.

As to the third complaint: A trustee testified the beneficiaries have asked for the sale. The law does not require tangible evidence of this be given the debtor and on this ground the prayer for injunctive relief must be denied.

As to the second ground that the Corplainant did not know the amount due: It appears from her testimony that the trust indebtedness of four notes totalling $25,000.00 has not been paid and that while the interest due monthly was timely paid on October 22, 1978, no interest has been paid since, making the trust in default. On this ground the prayer is denied.

The Complainant testifies that her property has been listed for sale with brokers on and off for some three years. This is confirmed by the testimony of a sales representative of Town and Country, Hilma Joerg, who testifies to three time periods for a listing through their company and through them with Multiple listing. The listing required that appointments for inspection made well in advance and cleared through a particular employee Town and Country. The Complainant received an offer of $20,000.00 for the property in May, 1979 but rejected it because

involved a contingent sale of the prospective buyer's resid-
. The Complainant describes the property as being worth, in
opinion as owner, $125,000.00.

As to the first ground complaining of sale for cash: The
erty involves a first deed of trust to Guardian Federal
the amount of $30,000.00 bearing 7½ percent interest, which
t is in evidence and provides essentially that it may not be
med without approval of the lender), upon which the Com-
inant says she has not made any payments since November, 1979.
property is, of course, subject to the second trust in the
ipal amount of $25,000.00. The property is further subject
judgment of approximately $16,900.00, entered in this court
w No. 21112, in favor of the District of Columbia National
. The file in that case shows the matter has been referred
Commissioner of Sale. That suit began as an attachment
e judgment. In that suit judgment was delayed two months to
t the Complainant to attempt a sale on her own.

The Complainant suffers from a heart condition and testifies
quired her moving to California temporarily from April,
until a week ago, all on her doctor's advice to seek less
uted air.

The Complainant testifies that she is willing to take a
's trust for any sums due her at 10 percent interest per
(a favorable rate) with interest payable monthly and the
ipal due in three years. The Complainant was told by the
to present this in writing to the Trustees in the ten
ute period between announcement of the decision at Noon and

time at 12:10 P.M. when the Trustees would have to leave the urt in order to drive to the place of sale. She was advised at it was conceivable the Trustees in the exercise of discre- on might announce this at sale to induce higher bidding but y would not have to. The Complainant then expressed a concern at she would have to approve a particular buyer, and after a lloquy the Court announced it was satisfied that she did not h to make such an offer in writing as suggested.

It appears to the Court that the Complainant has insufficient owledge of land sale practices to arrange a sale on her own. has even had difficulty dealing with experienced brokers and failed to act in timely fashion. The Trustees appear to have perly exercised discretion to sell for cash on a deposit of ,500.00 at sale, with settlement in thirty days. Accordingly, all grounds the prayer for relief is denied.

The Complainant moved for a 24 hour delay to permit an al. It appears to the Court that some 20 to 24 telephone ls or contacts have been received by the Trustees from firms persons interested in the foreclosure sale. It appears that sale is likely to involve spirited bidding, not only for this on but also by reason of the location on South Arlington Ridge with a view of the nation's capitol. It appears that such y would defeat the sale as advertised. The Motion is denied.

Trustees are directed to present an Order making reference to opinion to be presented to the Court on Friday, February 8, 0, at 10:00 A.M. without further notice.

uary 6, 1980

Judge

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

WINIFRED M. GOUDIE, Complainant	)	
vs	)	IN CHANCERY NO. 30571
MARY COOK HACKMAN and AMANDA R. ELLIS Defendents	)	

3/5/80

ORDER

THIS CAUSE came on to be heard this 5th day of March, 1980, upon the Motion of the Complainant, WINIFRED M. GOUDIE, for a Temporary Restraining Order, upon the Answer of the Defendants, and upon the Petition of the Defendants for a Writ of Possession, and upon argument of parties, there being present in Court the Complainant, WINIFRED M. GOUDIE, and the Defendants, MARY COOK HACKMAN, and AMANDA R. ELLIS,

IT APPEARING TO THE COURT right and proper so to do, it is therefore

ADJUDGED, ORDERED and DECREED that Complainant's Motion for a Temporary Restraining Order be, and it hereby is denied; and it is further

ADJUDGED, ORDERED and DECREED that the Complainant note any objections she may have to the Proposed Settlement Sheet, filed herein, in writing, to be delivered to the Trustees, at or before settlement; and it is further

ADJUDGED, ORDERED and DECREED that the Complainant may attend the settlement and listen to what is said, but may not speak or otherwise participate; and it is further

ADJUDGED, ORDERED and DECREED that the Trustees shall give timely notice to the Complainant of the presentation to the Commissioner of Accounts of their final accounting in this matter; and it is further

BOOK NO. 217 PAGE 422
ON May 5, 1980

P. O. Box 1647
ARLINGTON, VIRGINIA 22210
243-5500

ADJUDGED, ORDERED and DECREED that Defendants' Petition For a Writ of Possession be, and it hereby is, denied at this time; and it is further

ADJUDGED, ORDERED and DECREED that whereas the Complainant is not an attorney, her signature to this Order be, and it hereby is, waived.

ENTERED this 5th day of March, 1980

Paul E. Brown, Judge

Mary Cook Hackman, Trustee

Amanda R. Ellis, Trustee

TESTE:

In the

SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

Winifred M. Goudie, Appellant

vs.

Mary Hackman and Amanda Ellis, Appellees

ON APPEAL FROM THE VIRGINIA SUPREME COURT

APPENDIX B

ARTICLE 3.1.

Master and Incorporating Deeds of Trust.

§ 17-83.2. Recordation of master deed of trust. — Any person may record in any clerk's office in the State where deeds are recorded a form of a deed of trust, hereinafter referred to as a "master deed." (1954, c. 8.)

§ 17-83.3. Form and requisites of master deed of trust. — The master deed shall bear the caption "Master Deed of Trust," and may contain any provisions not in conflict with law. The provisions shall be numbered or lettered, clearly distinguishable one from the other, and susceptible of exact reference. (1954, c. 8.)

§ 17-83.4. Recordation, effect and requisites of incorporating deed. — Any person may record a deed of trust hereinafter referred to as an "incorporating deed," which incorporates by reference any one or more of the provisions of a master deed recorded in the same clerk's office. The provisions incorporated by reference shall be of the same force and effect and shall be as binding upon the parties to the incorporating deed and their successors in title as if fully set forth in the incorporating deed. No incorporating deed shall refer to more than one master deed. (1954, c. 8.)

Code Commission note. — Sections 8-633 and 8-638, referred to in this section, were repealed by Acts 1977, c. 617. For present provisions relating to similar subject matter, see §§ 8.01-50 and 8.01-53.

§ 26-13. Enforcing filing of such inventories. — If any such fiduciary fail to make the return required by § 26-12, the commissioner shall issue, through the sheriff or other proper officer, a summons to such fiduciary, requiring him to make such return; and if such return be not made within thirty days after the date of service of the summons, the commissioner shall report the fact to his court. The court shall immediately thereupon order a summons to the fiduciary, requiring him to appear; and upon his appearing unless excused for sufficient reason, he shall be fined by the court in a sum not to exceed five hundred dollars. If the fiduciary still fail to make the return within such time as the court may prescribe, he shall be deemed guilty of contempt of court, and be dealt with accordingly. (Code 1919, § 5403; 1932, p. 337; 1956, c. 159.)

§ 26-14. Commissioners to inspect and file inventories with clerks. — The commissioner shall inspect all inventories returned to him by fiduciaries, see that they are in proper form, and, within ten days after they are respectively received and approved by him, deliver them to the clerk of the court, to be recorded as required by law. (Code 1919, § 5403; 1932, p. 337.)

§ 26-15. Accounts of sales under deeds of trust, etc. — When sale is made under any recorded deed of trust, mortgage or assignment for benefit of creditors, otherwise than under a decree, there shall, within four months after the sale, be returned by the trustee to the commissioner of accounts of the court wherein the instrument was first recorded an account of sale. The commissioner shall state, settle and report to the court an account of the transactions of such trustee, and the same shall be recorded as other fiduciary reports. Any trustee failing to comply with this section shall forfeit his commissions on such sale, unless such commissions are allowed by the court. If the commissioner of accounts of the court wherein an instrument was first recorded is advised in writing by a party in interest that an account as required by this section has not been filed, the commissioner and the court shall proceed against the trustee in like manner and impose like penalties as set forth in § 26-13, unless such trustee is excused for sufficient reason. If after a deed of trust is given on land lying in a county, and before sale thereunder, the land is taken within the limits of the incorporated city, the returns of the trustee and settlement of his accounts shall be before the commissioner of accounts of such city. (Code 1919, § 5404; 1946, p. 325; 1966, c. 333.)

This section and § 26-29 do not oust a court of equity of its jurisdiction to enjoin improper settlement by a trustee under a deed of trust. Bradley v. Canter, 201 Va. 747, 113 S.E.2d 878 (1960).

Action under federal question jurisdiction not maintainable. — This section did not involve sufficient State action to permit plaintiffs to maintain a cause of action under federal question jurisdiction. Levine v. Stein, 560 F.2d 1175 (4th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S. Ct. 891, 54 L. Ed. 2d 797 (1978).

§ 26-16. Recordation of inventories and accounts of sales. — Every inventory and account of sales returned under §§ 26-12 and 26-15 shall be recorded by the clerk in what are known as will books, and indexed as required by § 17-59. (Code 1919, § 5405.)

Action under federal question jurisdiction not maintainable. — This section did not involve sufficient State action to permit plaintiffs to maintain a cause of action under federal question jurisdiction. Levine v. Stein, 560 F.2d 1175 (4th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S. Ct. 891, 54 L. Ed. 2d 797 (1978).

§ 26-16.1: Repealed by Acts 1962, c. 111.

agent or attorney in fact for a person in the armed forces or military service of the United States, or for a person who after executing a power of attorney or agency agreement entered the armed forces or military service of the United States, or for a person who departed from the United States by permission or direction of any department or official of the United States in connection with work relating to the prosecution of the war, when the power of attorney or agency agreement under which the deed or other instrument was signed was not executed in such a manner as to be valid as a sealed instrument, shall be held, and the same are hereby declared, valid and effective in all respects if otherwise valid according to the law then in force.

The provisions of this section shall not operate to affect adversely intervening vested rights. (1946, p. 190; Michie Suppl. 1946, § 5145a.)

Cross reference. — As to powers of attorney executed by members of armed services listed as missing in action, see § 11-9.3.

§ 55-57. Form of a lease. — A deed of lease may be made in the following form, or to the same effect: "This deed, made the ..... day of ....., in the year ...., between (herein insert the names of parties), witnesseth: that the said ..... doth (or do) demise unto the said ....., his personal representative and assigns, all (here describe the property) from the ..... day of ....., for the term of ....., thence ensuing, yielding therefor during the said term the rent of (here state the rent and mode of payment). Witness the following signature and seal (or signatures and seals)." (Code 1919, § 5165.)

Cross reference. — See generally, § 55-48 and note.

Article 2.

Form and Effect of Deeds of Trust; Sales Thereunder; Assignments; Releases.

§ 55-58. Form of deed of trust to secure debts, etc. — A deed of trust to secure debts or indemnify sureties may be in the following form, or to the same effect: "This deed, made the ..... day of ....., in the year ...., between ..... (the grantor), of the one part, and ..... (the trustee), of the other part, witnesseth: that the said ..... (the grantor) doth (or do) grant unto the said ..... (the trustee), the following property (here describe it): In trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon). Witness the following signatures and seals (or signature and seal)." (Code 1919, § 5166.)

Cross reference. — See generally, §§ 55-48, 55-57.

The objects of this section are to preserve a general form for deeds of trust, where the parties do not prefer some other form, and to save labor in the preparation of such instruments. Michie v. Jeffries, 62 Va. (21 Gratt.) 334 (1871).

Deed held deed of trust and not mortgage. — A deed substantially in the form prescribed for a deed of trust by this section is a deed of trust, and not a mortgage, and the fact that it does not prescribe any terms of sale is immaterial, where the trustee, making a sale thereunder, complies in all respects with § 55-59. Hopkins v. Givens, 119 Va. 578, 89 S.E. 871 (1916).

§ 55-58.1. Security trusts defined; requirements for trustees and for recordation. — (1) For the purposes of this article, the term "security trust" shall include a deed of trust, mortgage, bond or other instrument, entered into

after the effective date of this article under which the title to real and personal property, or either of them, wholly situate in and including no property situate outside of the State of Virginia, is conveyed, transferred, encumbered or pledged to secure the payment of money or the performance of an obligation; provided, however, that the provisions of this article shall not apply to supplements to existing security trust instruments now of record executed pursuant to the provisions of said existing security trust instruments, nor shall the article apply to security trusts applying to property singly or jointly owned and situate partly in this State and partly outside this State or to property situate in this State which, together with property situate outside this State, is the security for the performance of an obligation.

(2) No person not a resident of this State may be named or act, in person or by agent or attorney, as the trustee of a security trust, either individually or as one of several trustees, the other or others of which are residents of this State. No corporation may be named or act as the trustee or as one of the trustees of a security trust unless it is chartered under the laws of this State or of the United States of America, and unless its principal office is within this State.

(3) No clerk shall hereafter admit any security trust for recordation which does not state the residence address of the trustee or trustees named therein; provided, however, that the county, city or town in this State in which the said trustee resides shall be sufficient statement of the residence address thereof; notwithstanding any other provisions of this section, if any security trust is admitted by a clerk for recordation it shall be conclusively presumed that such security trust complies with all the requirements of this section.

(4) All deeds of trusts, mortgages, bonds or other instruments recorded by the clerk without the residence address of the trustee or trustees named therein shall be valid for all purposes as if such address had been named therein, if such recordation be otherwise valid according to the law then in force, provided, that this section shall not affect any right or remedy of any third party which accrued after the recordation of said instrument or before July one, nineteen hundred sixty. (1960, c. 565; 1962, c. 156; 1966, c. 398.)

§ 55-59. How deed of trust construed; duties, rights, etc., of parties. — Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

(2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property, including the fees and charges of such agents or attorneys as the trustee may deem advisable to employ at any time for the purpose of the trust, so long as any obligation upon the grantor under the deed of trust remains undischarged.

(3) The grantor shall be deemed to covenant that he will keep the improvements on the property in tenantable condition, whether such improvement were on the property when the deed of trust was given or were thereafter placed thereon.

(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property.

(5) The grantor shall be deemed to covenant that in the event of his failure to meet any obligations imposed upon him then the trustee or any beneficiary may, at his option, satisfy the same; and the money so advanced with interest thereon shall be a part of the debt secured by the deed, in the event of sale to

be paid next after the expenses of executing the trust, and shall be otherwise recoverable from the grantor as a debt.

(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and shall take possession of the property and proceed to sell the same at auction at the premises or at such other place in the city or county in which the property or the greater part thereof lies, or in the corporate limits of any city surrounded by or contiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select upon such terms and conditions as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide or, if none be provided, the trustee shall advertise the time, place and terms of sale once a week for four successive weeks in a newspaper published or having general circulation in the county or city in which the property or some portion thereof is located and may sell such property on the twenty-second day after the first advertisement or any day thereafter. It is not intended, however, to declare that other and different advertisement may not in any case be deemed reasonable, nor to prevent the trustee from giving the sale such additional advertisement as he deems advisable. The trustee or party secured shall give written notice of such proposed sale by personal delivery, or by certified or registered mail to the present owner of the property at his last known address, as such owner and address appear on the records of the party secured. Mailing of a copy of the advertisement or a notice containing the same information fourteen (14) days prior to such sale shall be a sufficient compliance with the requirement of notice. Failure to comply with the requirements of notice shall not affect the validity of the sale under the deed of trust, and the purchaser shall be under no duty to ascertain whether such notice was validly given. Any sale of property held less than twenty-eight days after the date of the first publication made prior to July one, nineteen hundred sixty, in substantial conformity herewith is hereby validated.

(7) If the property or some portion thereof is located in a city, or in a county immediately contiguous to a city of the first class, publication of the advertisement five different times in any newspaper published or having general circulation in such city or county (the last insertion if desired on the day of sale) shall be deemed adequate; it not being intended, however, to declare that other and different advertisement may not in any case be deemed reasonable, nor to prevent the trustee from giving the sale such additional advertisement as he may deem advisable. The advertisement and sale of property made prior to January one, nineteen hundred fifty-six, in substantial conformity herewith is hereby validated.

(8) If the deed of trust itself provides a method of advertising, which may be done by using the words "advertisement required," or words of like purport, followed by the method agreed on, then no other or different advertisement shall be necessary, beyond what the deed calls for, though the trustee may, in his discretion, give further advertisement.

(9) The trustee may postpone the sale at his discretion, in such case giving such notice by advertisement of such postponement as he may deem reasonable, and, without meaning to declare any other method unreasonable, when the advertisement is by publication in a newspaper the continuation thereof in subsequent issues of such newspaper with a note of such adjournment appended shall be deemed adequate in the absence of contrary provision in the deed of trust.

(10) The trustee may require of any bidder at any sale a cash deposit of as much as ten per centum of the sale price (unless the deed of trust specifies a

different maximum, which may be done by the words "bidder's deposit of not more than ..... dollars may be required," or words of like purport), before his bid is received, which shall be refunded to the bidder unless the property is sold to him, otherwise to be applied to his credit in settlement or, should he fail to complete his purchase promptly, to be applied to pay the costs and expense of sale and the balance, if any, to be retained by the trustee as his compensation in connection with that sale.

(11) If the sale be upon credit terms the deferred purchase money shall bear interest from the day of sale and shall be secured by a deed of trust upon the property contemporaneous with the trustee's deed to the purchaser.

(12) The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his office.

(12a) A purchaser for value of the property may rely on a recital in the trustee's deed as to compliance by the trustee with the provisions of paragraph (6) hereof requiring service of notice of the sale on the grantor or his successor in title.

(13) The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; secondly, to discharge all taxes, levies, and assessment, with costs and interest, including the due pro rata thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, and any liens of record inferior to the deed of trust under which sale is made, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution.

(14) Upon discharge of all the debts, duties and obligations imposed by the deed upon the grantor, including any expenses incurred preparatory to sale, then upon the grantor's request the trustee shall execute and deliver a good and sufficient deed of release at the grantor's own proper costs and charges.

Any sale of property located in a city, made under a deed of trust after first advertising the time, place and terms of sale once a week for four successive weeks in a newspaper published or having general circulation in such city, is validated, provided such sale was otherwise conducted according to law. (Code 1919, § 5167; 1922, p. 364; 1926, p. 591; 1940, p. 879; 1944, p. 481; 1952, c. 370; 1954, c. 557; 1956, c. 674; 1960, c. 5; 1964, c. 501; 1968, c. 786; 1970, c. 12; 1973, c. 341.)

I. In General.
II. Foreclosure by Sale.
III. Right of Trustee to Compensation and Expenses.

Cross References.

See generally, § 55-58 and note. As to dower or curtesy in surplus after lien satisfied, see § 64.1-28.

I. IN GENERAL.

The 1973 amendment deleted the former third sentence of subdivision (6), which provided that "No notice to the grantor or his successor in title shall be required unless required by the deed of trust," added the present third, fourth and fifth sentences of subdivision (6) and added subdivision (12a).

Section regulates conduct of trustee only so far as deed fails to do so. — It will be seen, on examination, that the object of this section is to prescribe the duties and regulate the

conduct of the trustee only so far as the deed fails to do so. Clark v. Moore, 76 Va. 262 (1882).

Deed is sole source of his authority. — The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. Williams v. Jones, 165 Va. 398, 182 S.E. 280 (1935).

Section controlling unless otherwise provided. — The provisions of this section are controlling when the deeds of trust do not otherwise provide. Colonial Inv. Co. v. Cherrydale Cement Block Co., 194 Va. 454, 73 S.E.2d 419 (1952).

The validity of an acceleration clause in a deed of trust is recognized. Where it is not otherwise provided by the deed of trust, this section requires such a clause to be read into it. Devany v. Colgin, 163 Va. 848, 178 S.E. 15 (1935).

Incorporation of section in deed by reference. — Suit was brought to set aside a sale of property under a deed of trust upon the ground that the sale had not been advertised once a week for four successive weeks in a newspaper as required by this section. At the time the deed was made, this section did not require a newspaper advertisement, and the statute, as it existed at that time, was expressly referred to, incorporated in and made a part of the deed of trust. It was held that the provisions of this section, as it existed at the time the deed of trust was made, became a material portion of the contract between the parties. Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 30 S.E.2d 686 (1944).

This section and § 55-60 do not affect the determination of lien priorities, but merely define certain language employed in the deed of trust. W.T. Jones & Co. v. Foodco Realty, Inc., 318 F.2d 881 (4th Cir. 1963).

Priority of real estate taxes over payment of foreclosure sale proceeds. — This section and § 58-762 give real estate taxes a priority over the payment of the proceeds of a foreclosure sale. They direct that the foreclosure trustee must satisfy all outstanding tax deficiencies before distributing the proceeds, and in the event that this section fails, it is provided that the delinquent taxes shall remain a debt outstanding against the purchaser at the sale. In re Polumbo, 271 F. Supp. 640 (W.D. Va. 1967).

Power of court to enjoin settlement of trustees' account. — A court of equity had jurisdiction to entertain a bill of complaint filed by beneficiaries under a second deed of trust seeking injunction against excessive settlement by the trustees under first deed of trust. Bradley v. Canter, 201 Va. 747, 113 S.E.2d 878 (1960).

Frazier-Lemke Act was invalid as regards this section. — The Frazier-Lemke Act, in spite of its amendments, was unconstitutional under the Fourteenth Amendment of the federal Constitution as regards this section. In re Sherman, 12 F. Supp. 297 (W.D. Va. 1935).

Applied in Seward v. New York Life Ins. Co., 154 Va. 154, 152 S.E. 346 (1930); Equity Mtg. Corp. v. Loftus, 323 F. Supp. 144 (E.D. Va. 1970); Musgrove v. Glasgow, 212 Va. 852, 188 S.E.2d 94 (1972).

II. FORECLOSURE BY SALE.

Requests by beneficiary. — Although the beneficiary did not actually request the trustee to sell, it was clear from the circumstances that his actions were tantamount to a request. Rogers v. Runyon, 201 Va. 814, 113 S.E.2d 679 (1960).

Statute determining method of advertising. — Under a provision in a deed of trust that in event of default the trustee should sell the real estate pursuant to this section, the method of advertising the sale is to be measured and determined by the language of the statute which was in effect at the date of the execution and delivery of the deed, and not by that which was in effect at the time of the sale. Cromer v. DeJarnette, 188 Va. 680, 51 S.E.2d 201 (1949).

Provision as to advertising is not retroactive. — The legislature, in providing that sales under deeds of trust shall be advertised once a week for four successive weeks in a newspaper, did not intend that this provision should affect deeds of trust, executed prior to its effective date, which embodied agreed terms of sale and an agreed manner of advertisement in event of foreclosure. Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 30 S.E.2d 686 (1944).

Lack of authority in trustee invalidates sale. — Lack of authority in the trustee under a deed of trust to foreclose goes to the validity of the sale itself. Wills v. Chesapeake W. Ry., 178 Va. 314, 16 S.E.2d 649 (1941).

But misapplication of proceeds does not. — Failure of the trustee to apply the proceeds properly does not invalidate the sale. Wills v. Chesapeake W. Ry., 178 Va. 314, 16 S.E.2d 649 (1941).

Trustee has power to sell either for cash or on time. — Even before the incorporation in this section of the present authority to sell "upon such terms and conditions as the trustee may deem best" such power was usually written in deeds of trust in this State. And from time immemorial such language has been interpreted by the profession to include the power to sell either for cash or on time. Obviously it was the purpose of the legislature to have the language of this section conform to the accepted practice, and thus to broaden and not to restrict the powers of the trustee.

Woodhouse v. Harrison, 168 Va. 574, 191 S.E. 776 (1937).

But his discretion is reviewable by the court. — The discretion granted by this section to a trustee under a deed of trust, as to the incidents of the sale, is reviewable by the courts. Perdue v. Davis, 176 Va. 102, 10 S.E.2d 558 (1940).

Advertisement for cash followed by sale on credit held not an abuse of discretion. Rogers v. Runyon, 201 Va. 814, 113 S.E.2d 679 (1960).

Trustee should apply to court to remove impediments to fair sale. — If there is doubt or uncertainty as to the debts secured, or the amount thereof, or disputes or conflicts among creditors, or any other impediment to a fair sale, the trustee should file a bill to have the matter determined, and he may and should delay the sale until the matter has been adjusted. If he fails or refuses to discharge his duty in this respect, any party interested or who would be injured by his default, may apply to a court of equity to have the necessary steps taken. Muller v. Stone, 84 Va. 834, 6 S.E. 223 (1888); Stull v. Harvey, 112 Va. 816, 72 S.E. 701 (1911).

By removal of cloud from title. — Where there is a cloud on the title to the trust property, the trustee should apply to a court of equity to have it removed before making the sale, and if he fails or refuses to discharge his duty in this respect any party interested or who would be injured by his default may apply to a court of equity to have it removed. Muller v. Stone, 84 Va. 834, 6 S.E. 223 (1888).

Or account of liens. — Where the land conveyed by a deed of trust is subject to various liens, it is essential that the trustee should make application to a court of equity to have an account taken of the liens and of their priorities. Alexander v. Howe, 85 Va. 198, 7 S.E. 248 (1888).

Section provides machinery for collection of taxes. — The provisions of this section, in the case of a foreclosure, set up a simple and expeditious machinery for the collection of a city's taxes. The city has nothing to do in the premises, but it receives the benefit of the services of the trustee. Broun v. City of Roanoke, 172 Va. 227, 1 S.E.2d 279 (1939).

And purchaser takes property free of delinquent tax liens. — This section and § 8-660 assure purchasers, at trustees' and commissioners' sales, that they will take the property free of delinquent tax liens, and that the taxes will be paid by the trustee out of the purchase price which he has collected. Broun v. City of Roanoke, 172 Va. 227, 1 S.E.2d 279 (1939).

Sale will not be enjoined because of financial depression. — A financial depression, or unprecedented scarcity of money for ordinary transactions, or enforced stagnation of the real estate market, is not sufficient to warrant a court of equity in restraining the exercise of the power of sale in a deed of trust. Williams v. Jones, 165 Va. 398, 182 S.E. 280 (1935).

Or because time is unpropitious. — Allegations to the effect that the time is unpropitious for a sale, that the land could likely be sold for a better price later, that the large cash payment required would be attended with great, if not irreparable, loss and injury to the debtor, present no grounds for the interposition of equity jurisdiction by injunction or otherwise. Williams v. Jones, 165 Va. 398, 182 S.E. 280 (1935).

III. RIGHT OF TRUSTEE TO COMPENSATION AND EXPENSES.

Compensation is controlled by deed or by this section. — The compensation is determined either by the contract in the deed itself, or by this section, which controls where there is no specific agreement. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

Under this section compensation is conditioned upon sale. — In this section provision is made for compensation of the trustee in case he sells the property under the deed of trust. For this service and for no other the statute provides, and that provision controls unless, as allowed by the statute, there are other provisions in the deed for the compensation of the trustee. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924). See Littleton v. Kincaid, 179 F.2d 848 (4th Cir. 1950).

But trustee is entitled to be reimbursed for expenses. — A trustee who in good faith engages the services of counsel to aid him in the exercise of his duties is entitled to pay them out of the trust fund, or to be reimbursed out of that fund for all expenses which he has incurred, including reasonable fees to attorneys, notwithstanding that he has made no sale so as to be entitled to the compensation provided by this section. Stull v. Harvey, 112 Va. 816, 72 S.E. 701 (1911).

The accepted rule is that the court shall exercise just discretion and make or withhold allowances as the peculiar circumstances require. Littleton v. Kincaid, 179 F.2d 848 (4th Cir. 1950).

Effect of sale by debtor. — Where a debtor has given a deed of trust to secure the payment of his debt, under ordinary circumstances he always has the right to sell the property himself to pay his debt. Generally, when there has been no sale by the trustee, the trustee has no claim for compensation. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

Compensation to trustee of executory trust. — A trustee, chosen to hold a legal title as a mere security for debt, with power to sell in case of default, possession to remain with the grantor and not the trustee, is not entitled to

invoke the jurisdiction of a court of equity to adjudicate his compensation, when he has not been and may never be called upon to execute the trust. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

If the trust had been either partly or completely executed, and the trustee had then invoked the jurisdiction of equity for the settlement of his accounts, or its direction as to the distribution of the trust fund, or the court had acquired jurisdiction over the estate upon any equitable ground, then unquestionably the court would consider and determine the amount of the trustee's compensation for all the services previously rendered. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

Compensation for holding insurance policy. — The holding of insurance policies on the property conveyed by the trustee in a deed of trust was a mere incidental service, for which the trustee was not entitled to compensation from the creditors secured or from the property, where the grantor, not the creditors, covenanted to keep the property insured. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924). See § 55-60, subdivision (8).

For countersigning bonds. — Where no compensation was provided for the countersigning of bonds for the purpose of identification, such act being expressly required of the trustee, while this service could not be required without compensation, yet when it was rendered without expressed or implied agreement for compensation it must be regarded as voluntary, either as incidental to the acceptance of the trusteeship or as satisfied by the anticipated compensation in case there should be a default and sale. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

For representing beneficiaries in bankruptcy. — Where a trustee in a deed of trust appeared for the beneficiaries under the deed in bankrupt proceedings against the grantor, but the grantees failed to file proofs of their claim, choosing to rely upon the security afforded by the deed, the grantees cannot be held personally liable for attorney's fees, nor was the property pledged liable. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

The trustee is entitled to compensation whether his services were rendered as attorney or as trustee. But a court is only justified in paying attorney's fees out of the trust fund under its control where parties in interest have stood by without counsel, and reaped benefits by reason of the efforts of counsel with whom they were not in privity. Dillard v. Serpell, 138 Va. 694, 123 S.E. 343 (1924).

§ 55-60. Meaning of phrases that may be included in such trust deed. — The following provisions may be incorporated in any such deed of trust in the respective short forms indicated, namely:

(1) The words *"identified by trustee's signature,"* or words of like purport, shall be construed as if the deed set forth: "All of which said notes (or other obligations) bear the marginal signature of the trustee for the purpose of identification but for no other purpose whatever."

(2) The words *"deferred purchase money,"* or words of like purport, shall be construed as if the deed set forth: "This deed of trust is a contemporaneous purchase money deed of trust and secures the payment of deferred purchase money due by the grantor upon the property hereby conveyed."

(3) The words *"exemptions waived,"* or words of like purport, shall be construed as if the deed set forth: "The grantor hereby waives the benefit of his exemptions as to the debt hereby secured and as to all other obligations which may be imposed upon him by the provisions of this deed of trust."

(4) The words *"subject to all upon default,"* or words of like purport, shall be construed as if the deed set forth: "Should default be made in the payment of any part of the debt hereby secured, principal or interest, at the maturity of such part, or in the event of the breach of any of the covenants entered into or imposed upon the grantor, then the entire obligation of this deed of trust and the whole debt hereby secured shall, at the option of the beneficiaries, become forthwith due and payable."

(5) The words *"renewal or extension permitted,"* or words of like purport, shall be construed as if the deed set forth: "The grantor hereby consents and agrees that the debt hereby secured, or any part thereof, may be renewed or extended beyond maturity as often as may be desired by agreement between the creditor and any subsequent owner of the property, and no such renewal or extension shall in any way affect the grantor's responsibility, whether as surety or otherwise."

(6) The words *"Right of anticipation reserved,"* or words of like purport, shall be construed as if the deed set forth: "The grantor reserves the right to anticipate the payment of the debt hereby secured, or any part thereof which is represented by a separate note (or other obligation) at any interest period by the payment of principal and interest to the date of such anticipated payment only."

(7) The words *"priority in direct order of maturity,"* or words of like purport shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the direct order of their maturities, each having priority over all others falling due after its maturity." And the words, *"priority in inverse order of maturity,"* or words of like purport, shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the inverse order of their maturities, each having priority over all others falling due before its maturity."

(8) The words *"insurance required ..... dollars,"* or words of similar purport, shall be construed as if the deed set forth: "The grantor covenants that he will keep the improvements on the property insured against fire in some solvent insurance company approved by the trustee for the benefit of the beneficiaries hereunder in the sum of at least ..... dollars, and will deposit with the trustee or beneficiary the policies, with standard loss payable clauses with full contribution in favor of the trustee as his interest may appear; and the grantor further covenants that in the event of his failure to keep the property so insured and the policies so deposited, then the trustee or any beneficiary may, at his option, effect such insurance and pay the premium thereon and the money so paid, with interest thereon, shall become a part of the debt hereby secured, in the event of sale to be paid next after the expenses of executing this trust, and shall be otherwise recoverable from the grantor as a debt, but there shall be no obligation upon the trustee or beneficiary to effect such insurance."

(9) The words *"substitution of trustee permitted,"* or words of like purport, shall be construed as if the deed set forth: "Grantor grants unto the beneficiary or beneficiaries or to a majority in amount of the holders of the obligations secured hereunder and to their assigns the right and power, under the provisions of § 26-49, to appoint a substitute trustee or trustees."

(10) The words *"any trustee may act,"* or words of similar purport, shall be construed as if the deed set forth: "The grantors, and all interested in the obligations hereby secured, by accepting the benefits hereof, agree that all authority, power and discretion hereinabove granted to the trustees may be exercised by any of them, without any other, with the same effect as if exercised jointly by all of them." (Code 1919, § 5167; 1926, p. 593; 1940, p. 881; 1966, c. 93; 1970, c. 39.)

Cross reference. — See generally, § 55-59 and note.

This section and § 55-59 do not affect the determination of lien priorities, but merely define certain language employed in the deed of trust. W.T. Jones & Co. v. Foodco Realty, Inc., 318 F.2d 881 (4th Cir. 1963).

Time price differential as "interest". — Although a time price differential is not interest for purposes of the usury statutes, under any interpretation it represents a charge for credit and this section does not require a construction so narrow as to exclude such charges from the term "interest." General Elec. Credit Corp. v. Lunsford, 209 Va. 743, 167 S.E.2d 414 (1969).

Applied, as to subdivision (5), in Thompson v. Miller, 195 Va. 513, 79 S.E.2d 643 (1954); Equity Mtg. Corp. v. Loftus, 323 F. Supp. 144 (E.D. Va. 1970).

§ 55-60.1. Evidences of indebtedness placed on equal footing. — When bonds, notes or other evidences of indebtedness are secured by a deed of trust, mortgage, vendor's lien or other lien, such bonds, notes or other evidences of indebtedness shall, in the event the lien is executed or foreclosed, be secured on an equal footing and shall be paid ratably out of the proceeds of any sale

of property subjected to the lien and shall have no priority, the one over the other, whether by priority of assignment or otherwise, unless the instrument creating the lien expressly provides otherwise. (1934, p. 516; Michie Code 1942, § 6457a.)

§ 55-61. Sales under deeds of trust which contain no maturity date or provision authorizing sale. — When any property, real or personal, is conveyed by deed of trust, whether heretofore or hereafter made, to a trustee, to secure the payment of a debt, money, notes, bonds, stocks or other evidences of debt and there is no date fixed for the maturity thereof and such deed of trust contains no provision authorizing the trustee to make sale of such property, or any part thereof, and the reinvestment of the proceeds of sale in other property subject to the terms of such deed of trust, the circuit and corporation courts, or such court having jurisdiction of the subject matter, upon a bill filed by any one or more of the lien debtors, in which bill all persons interested in such lien and all holders of the evidences of debt secured by the deed of trust thereon, and all other necessary or proper parties, except the plaintiffs, shall be made defendants, may decree a sale of such property, or any part thereof, and may invest the proceeds of sale under decree of court subject to the terms of the deed of trust; provided, that the bill of complaint shall set forth facts which will justify the sale of the property, to be verified by the affidavit of at least one of the plaintiffs; provided, further, that no decree shall be made authorizing such sale unless it shall be shown to the satisfaction of the court that the interests of the lien debtor or debtors will be promoted and the interests of no person or persons holding the evidences of debt secured by the deed of trust will be violated thereby; provided, further, that the plaintiff or the party for whose benefit the suit is brought shall bear the cost. (1932, p. 77; Michie Code 1942, § 5167a.)

§ 55-61.1. Validation of conveyances of real property under trust instrument not authorizing sale. — When any real property is conveyed by deed of trust, or other trust instrument, whether heretofore or hereafter made, to a trustee and there is no provision authorizing the trustee to convey the property or any part thereof, which is the subject of such deed of trust, and the trustee conveys said property or any part thereof, such conveyance shall be valid after a period of thirty years from the date of such conveyance, provided there have been no adverse claims against the property so conveyed in the interim, and provided that such conveyances to and from said trustee were properly recorded and indexed at the time of the conveyance, in the appropriate clerk's office wherein deeds are recorded in the county or city wherein the property lies. (1962, c. 350.)

§ 55-62. Permissible form for notice of sale under deed of trust. — Notice of sale under any deed of trust whether the same be in conformity with § 55-59 or not, in the absence of provision therein requiring other or additional matter, may be substantially in the form following:

Trustee's Sale of

.....

(brief description or identification of property)

In execution of a deed of trust, (name or names of grantor or grantors unless grantor or grantors request in writing that the same be omitted,) dated ...., recorded in the Clerk's Office of the ..... court of ..... in Deed Book ..... page ....., the undersigned trustee will offer for sale at public auction (a brief description of the property and place of sale) on the ..... day of ....., nineteen hundred

In the

SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

Winifred M. Goudie, Appellant,

vs.

Mary Hackman and Amanda Ellis, Appellees

ON APPEAL FROM THE VIRGINIA SUPREME COURT

AFFIDAVIT OF SERVICE

I, Winifred M. Goudie, after first being sworn and on oath, hereby certify that three copies of the foregoing Motion to Dispense with Printing, Motion for Leave to Proceed in Forma Pauperis, Affidavit and Jurisdictional Statement with Appendix were mailed by certified mail and postage prepaid to Mary Hackman and Amanda Ellis at 2009 N. 14th Street, Arlington, Virginia, 22201; and that all parties required to be served have been served this 4th day of September, 1980.

Winifred M. Goudie

Subscribed and sworn to before me this 4th day of September, 1980:

Notary Public

My commission expires

September 11, 1984